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Reply to Minneapolis office

January 3, 1992

Ms. Donna Searcy
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

MM Dkt. 92-51

RECEIVED

JAN 6 1992

FCC MAIL BRANCH

**IN RE: Petition for
Declaratory Ruling
Regarding Security Interest
in F.C.C. Licenses
MMB File No. 910221A
MMB File No. 870921A**

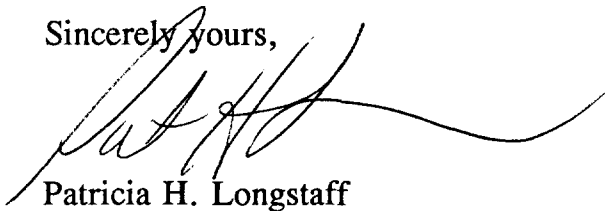
Dear Ms. Searcy:

Enclosed are a Petition to Accept Late Filed Comments and the Comments of Norwest Bank Minnesota for the Commission's consideration in the above matter. The original is accompanied by ten copies as per CFR § 1.419. All copies contain a certificate of service on the petitioners and all parties who have filed comments.

Please acknowledge receipt of these documents by stamping the extra copy of the petition enclosed and returning it to us in the enclosed envelope.

If you have any questions, please contact me.

Sincerely yours,



Patricia H. Longstaff

Enclosures

cc: Roy J. Stewart, Chief, Mass Media Bureau
David Horowitz, Chief, MMB Legal Branch
Eugenia Hull, Mass Media Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petitions for Declaratory)	MMB File No. 910221A
Ruling Regarding Reversionary)	MMB File No. 870921A
and Security Interests)	
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**MOTION TO ACCEPT
LATE-FILED COMMENTS**

JAN 6 1992
FCC MAIL BRANCH

Norwest Bank Minnesota requests that the Commission accept its comments filed after the closing date in these proceedings.

The comments discuss the impact of a number of developments since the closing date for comments. The Federal Communications Commission, several federal regulators of financial institutions and Congress have all taken steps that have altered the landscape in which this decision must be made.

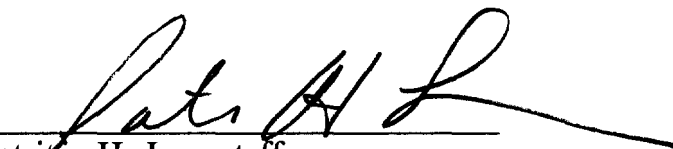
The comments have attempted to avoid duplicative discussion of matters adequately briefed by the petitioners, commentators and other sources available to the Commission.

Norwest understands that the submission of these comments will not delay a decision in this matter and knows of no prejudice that their acceptance will bring to the interests of the petitioners or the many commentors.

Therefore, Norwest requests that the comments filed herewith be accepted for consideration in this matter.

Respectfully submitted,

FOR NORWEST BANK MINNESOTA

By 
Patricia H. Longstaff
Minnesota Attorney License
No. 45408

Date: 1-3-92

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MM Dkt. 92-51

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petitions for Declaratory
Ruling Regarding Reversionary
and Security Interests

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MMB File No. 910221A
MMB File No. 870921A

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JAN 6 1992

FCC MAIL BRANCH

COMMENTS OF
NORWEST BANK MINNESOTA

Patricia Hirl Longstaff

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SUMMARY

These comments are filed after the deadline set by the Commission because these commentators believe that recent events and newly available information have a profound impact on the issues presented by the petitions.

The Office of Plans and Policy has recently documented the new world facing broadcasting. It is a world where the high-cost financing options that most broadcasters have been forced to use have become a serious handicap. Legal uncertainty about security interests in the license has precluded most broadcasters from obtaining the traditional financing by local lending institutions that has been available to other businesses in their communities. They were forced to go to specialty lenders or to sell equity to acquire operating and investment capital.

The high costs associated with this kind of financing were, for many years, easily absorbed by these generally very profitable businesses or obscured by ever-rising market prices. They have now been brought into sharp focus for broadcasters who must cut costs and find new financing to meet the challenges and opportunities of the 1990's.

The Commission statements that seemed to preclude security interests in the station's license appear to have arisen out of confusion about the very different legal concepts of "ownership" and "property interest." The now well-developed law that governs licensing of the "use" of

intangible property (such as trademarks) makes clear that a licensee does not receive an ownership interest but does receive a limited property interest that can be highly valued in the marketplace.

These comments review the history of this confusion as well as its very real consequences in modern broadcast financing. The comments assert that granting the petitions now before the Commission is in the best interests of broadcasters, lenders and the public.

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Before the
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Washington, D.C. 20554

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COMMENTS OF
NORWEST BANK MINNESOTA

JAN 6 1992

FCC MAIL BRANCH

INTRODUCTION

The Commission has before it two petitions for declaratory ruling regarding the interests of lenders in a broadcast license. These comments are filed after the closing date for comments and replies set by the Commission¹ but in hope that they will aid in the discussion of these matters, particularly in light of developments that have taken place since the comment period closed, including the comments filed by the Motion Picture Association of America, new regulations applicable to financial institutions that will exacerbate the problems identified in the petition, and a ruling by a federal bankruptcy court that supports the position of these petitions.

¹ Comment period was extended to April 22, 1991, and the reply period to May 7, 1991, by order adopted April 10, 1991.

The Commission's previous interpretations of the Communications Act as it applies to property interests in licenses and recent Bankruptcy Court decisions² are examined here for their impact on the relationships between the broadcasting industry and financial institutions. The comments are limited to broadcasting because that is the apparent scope of the petitions, but the issues raised may be applicable to all licensees of the Commission.

These comments address the issues of control of the licensed service in the event of financial failure by the licensee and the safeguards that exist in both state commercial law and the Commission's rules to insure the public interest.

They examine the impact that severance of the license from the on-going business has on the interests of financial institutions, broadcasters and companies which supply services to broadcasters.

They submit that the public policy considerations that were the foundation of the Commission's past interpretations of the law have changed dramatically. The public interest will not be served if broadcasters can not get the access to capital that they *must* have in the

² *In re TAK Communications Inc.* Chapter 11 proceeding, United States Bankruptcy Court For the Western District of Wisconsin, Case No. MM11-91-00031. The District Court held that the lender could not have a secured interest because the F.C.C. had preempted state commercial law, and that the F.C.C. has ruled that licensees cannot grant a security interest; *Oklahoma City Broadcasting Co.*, 112 B.R. 425 (Bankr. W.D. Okla. 1990) lender's security interest limited to value of liquidation of assets. *But*, the opposite opinion was expressed by bankruptcy Judge James F. Schneider in a case involving a perfected security interest in all the debtor's assets. *See Wall Street Journal*, December 13, 1991 B2.

next decade in order to provide quality programming, and, in many cases, to survive at all. Nor would the public interest be served by a rule that results in huge losses for financial institutions which have loaned money in good faith to broadcast companies.

Norwest Bank Minnesota, National Association, is a wholly-owned subsidiary of Norwest Corporation, a diversified financial services company focusing on providing a wide array of financial products to consumers, small businesses, middle market and larger corporations. Norwest Corporation has approximately \$37.7 billion in assets and ranks as the seventeenth largest bank holding company in the nation with over 1,500 offices in 49 states.

Norwest Corporation, through its many banks, has worked with broadcasters for decades and believes that banks in small and mid-sized communities should play a role in keeping local broadcasters a vital part of their communities.

It has become increasingly difficult for banks such as Norwest to continue to financially support broadcasters due to several recent bankruptcy cases which have cast a cloud on the security of current and future loans. Norwest, like all the other commentors on these petitions, has a financial interest in the outcome of these proceedings but has attempted to address the issues in a comprehensive

way that acknowledges the interests of broadcasters, both secured and unsecured creditors, as well as the public.

We respectfully ask the Commission to grant the petitions and to issue a declaratory ruling that:

1. A licensee may grant a security interest in a broadcast license pursuant to state law without the consent or approval of the Commission, and the Commission is not preempting state law in this regard.

2. Granting and perfecting such a security interest is not a transfer, assignment or disposition for purposes of Section 310 of the Communications Act of 1934.

3. Such security interests created before and after the issuance of this declaratory ruling are not invalidated by the Communications Act or any ruling of the Commission.

It is important to note that neither the petitions nor these comments advocate that broadcasters must grant a secured interest in the license to lenders but merely makes this option available for those who wish to take advantage of this kind of financing.

I. THE NEW WORLD FACING BROADCASTERS AND LENDERS.

The new world of broadcasting will not be an easy one. Assumptions about the industry's future based on its past are no longer credible. Confident predictions about technology or its place in the future marketplace are increasingly hard to find.

These changes and uncertainties have caused the Commission to do a "reality check" to see if the rules that made sense twenty (or even five) years ago still accomplish goals like diversity of viewpoint, localism, quality programming, and minority ownership.³

In these actions the Commission echoes the data presented in a recent staff working paper on the economics of broadcasting (OPP paper).⁴ That paper concludes that television broadcasting is in an economic decline and that the situation for small market stations and weak independents is particularly precarious. The situation for radio is at least as bad.⁵

³ See, e.g., *Notice of Proposed Rule Making (regarding ownership restrictions)*, MM Docket No. 91-140; *AM Band Proceeding*, MM Docket No. 87-267; *Notice of Inquiry, In the Matter of Review of the Policy Implications of the Changing Video Marketplace*, MM Docket No. 91-221, Adopted July 11, 1991.

⁴ Florence Setzer and Jonathon Levy, *Broadcast Television in a Multichannel Marketplace*, Office of Plans and Policy, Working Paper Number Twenty Six, June, 1991.

⁵ See *Notice of Proposed Rule Making (regarding ownership restrictions)*, paragraph two, MM Docket No. 91-140, Adopted May 9, 1991.

The Commission's actions and the OPP paper all suggest that the structure of the industry as well as the way it delivers services may have to change in order for broadcasters to survive. The Commission has not affirmed that it must protect current licensees but seems to be taking steps to assure that its current rules do not contribute to the problem.

All of the statements filed recently by individual Commissioners with regard to proposed changes in the ownership rules express heightened concern for small broadcasting businesses, new entrants and minority owners.⁶ The harsh truth is that these people will have extremely limited opportunities to compete unless they have access to capital. Unlike their giant cousins they cannot go to the equity markets or private debt placement. Tragically, these people may be among the only businesses in America that will not be able to take advantage of the low interest rates currently being offered to jump-start the economy.

At the same time broadcasters know they must find ways to reduce their costs.⁷ They might do this by getting the economies of scale that would come from the ownership of many stations in different markets or several stations in the same market. The Commission's

⁶ MM Docket No. 91-140.

⁷ *Id.*, and OPP paper No. 26 169-172.

current inquiry into the effect of easing its multiple ownership restrictions reflects its interest in this option. But small and mid-size broadcasters would have very little opportunity to benefit from these changes if they can not finance the purchase of stations that would make these economies possible.

Indeed, small operations without access to capital could become prey to current multiple-station businesses which can, as Capstar, et al. have pointed out, get loans without a security interest because they can use all their properties to collateralize the loans.⁸ Faced with mounting losses and no way to upgrade or acquire the additional assets that will lower their marginal costs, they may be left with only one choice: sell. It is probably true that this will happen to many stations in any case, particularly those which are currently highly leveraged. But for others, their ability to tap the full value of their business to collateralize a loan may make a critical difference.

Some stations may find that the best way to prosper is to form joint ventures with other companies for selling advertising or gathering news, using their core competencies to provide essential services in a competitive market. A Commission policy that encourages joint ventures could lead to a variety of experimental business operations that will help discover ways for all the parties in these ventures to

⁸ See, Joint Comments of Capstar, et al., filed April 22, 1991 15 n.7.

increase revenues and decrease costs while providing effective competition to other information providers in their market. These ventures could put together enough resources to effectively sell local audiences to advertisers in the "spot" market or niche advertisers looking for specific demographics.⁹ They could also use these combined resources to provide competitive quality local programming and take greater advantage of equipment.

In addition to the economic pressure put on them by falling revenues and rising costs, broadcasters are aware that they will have to invest in new equipment in order to match the service and price offered by their competitors. This may require the purchase of equipment for HDTV, digital audio broadcasting (DAB), signal compression, or viewer response services.¹⁰

All of these options for cutting costs and increasing the quality of product require money. But very few broadcast businesses can afford to buy more stations, form joint ventures, or invest in expensive new equipment without access to capital. All of the Commission's current efforts to level the playing field will be for naught if broadcasters do not have equal access to the money that will keep them players.

⁹ Similar projects are being implemented in Detroit and Salt Lake City. *See, Broadcasting*, Oct. 28, 1991 10.

¹⁰ *See Reply of Comments of NAB 4; OPP paper No. 26 48-66.*

Until recently access to capital has not been a problem for most large broadcasters. The cash flow from stations was usually more than enough to cover the high interest they paid for being "risky" due to their lack of collateral. Others sold equity, obligating the business to even higher costs for their capital. Financing for smaller broadcasters has always been more difficult to find and generally more expensive. But this system worked to everyone's satisfaction until the economy went south, lowering ad revenues, station market values, and the expectations of banking regulators about the repayment of these loans.

Many of the same economic forces that threw the broadcasting business into this turmoil brought instability, and sometimes disaster, to the nation's financial institutions.

By the late 1980's, the effects of deregulation in the banking and savings and loan industries became apparent and lending institutions were scrambling to find investments with high returns to shore up their flagging bottom lines. This situation was exacerbated by mounting losses on real estate loans caused by new tax treatment of limited partnerships under the 1986 Tax Reform Act.

Many loan officers believed that the rapidly increasing sale prices and low default and bankruptcy rates made the high returns available for broadcasting loans very attractive.

When advertising revenues began to fall in 1989, both lenders and broadcasters assumed that a revived economy would bring revenues back to previous levels, just as it always did. But by mid 1990, it was clear that the revenue shortfalls were both cyclical and structural.¹¹ For many broadcasters there would be no bouncing back, and the possibility that they could meet their loan and supplier payments began to look increasingly dim.

As creditors began to talk about exercising their rights to collateral and suppliers began to threaten to cut off services, some broadcasters countered with a threat to refuse to sign an application to transfer the license, thereby jeopardizing sale of the property as a going business in a foreclosure sale. The status of the license also became a problem in bankruptcy cases.¹²

At the same time the Comptroller of the Currency began to look in earnest at the problem loans in each bank's portfolio in order to insure that the bank was not in danger of collapse. Regulators from several government agencies also began to scrutinize new loans that appeared to be risky. Any uncertainty about the value of the collateral could cause regulators to force banks to write off the loans, reducing the

¹¹ This was clearly another "bottom" in the revenue cycle caused by a deflated retail sector, but ad dollars were also starting to go to new competitors, both new broadcasters who entered the market in the 80's and new competition from cable and direct mail.

¹² These problems are discussed in detail in Section V.

return to their shareholders and pushing them closer to insolvency. This resulted in banks refusing to make any loan their regulators would regard as risky.

To make matters worse (and more risky, from a banking regulator's point of view), the *TAK* and *Oklahoma City Broadcasting* cases¹³ seemed to confirm that loans to broadcasters had become caught in a legal quagmire that could prevent full recovery for the bank.

Comments filed in this proceeding by both supporters and opponents acknowledge this situation.¹⁴ Any action by the Commission (including no action) will have a significant impact on the negotiations in current cases. The MPAA and the NAB suggest that the Commission should deny the petitions but start a rulemaking proceeding.¹⁵ This would certainly buy time for broadcasters which are currently in default and might allow others to hang on for somewhat longer.

But to do so, the Commission must find that this use of the "no property interest" language in its previous opinions to forestall creditors is in the *public* interest. These comments address the many

¹³ See n.2, *supra*.

¹⁴ See, Comments of General Electric Capital Corporation 7-10; Comments of Santarelli, Smith & Corroccio 10-11; Comments of Ameritrust Company National Association, Chemical Bank and New Bank of New England, N.A. 2; Comments of Motion Picture Association of America iii, 6, 10; Reply Comments of the National Association of Broadcasters 4-6.

¹⁵ MPAA 15; NAB 4.

facets of the public interest in these proceedings in Part V, *infra*, including the public interest (or lack thereof) in a situation where banks (and perhaps taxpayers) will pick up the tab for these loans.

In any case, any temporary benefit that denial of (or inaction on) this petition will have for some broadcasters currently negotiating with their lenders will almost certainly be offset by the detriment to others who are currently looking for affordable credit that has reasonable closing costs.¹⁶

II. COMMISSION RECOGNITION OF A BROADCASTER'S INTEREST IN THE LICENSE.

Even though the exact legal basis for the Commission's prior statements on this issue is difficult to pinpoint, it is quite clear that many Commissioners over the years have felt strongly that licensees should not be able to assert a "property" interest in the frequency they are licensed to use.

The legislative history reveals that this was based on their uncertainty about how the new licensing scheme would be treated in the courts. Congress clearly intended to head off the claims that were being asserted by some broadcasters that they had a vested property right in the

¹⁶ Currently these costs include higher "up front" fees such as due diligence investigations (paid by borrower), higher legal fees because agreements are more complicated and the enormous amounts of management time necessary to close them.

frequencies they were already using and did not have to submit to the new regulations. The use of the term "property interest" in these statements seems to indicate that Congress and the F.C.C. have been adamant in their denial that broadcasters have an *ownership* interest in the frequencies they use. However, a *property* interest could be something much less than ownership.¹⁷

The subsequent development of the law in this area has been ably described by the petitioners and in a recent law review article written by Commission staffer, Stephen F. Sewell.¹⁸ Both argue persuasively that the Commission's previous interpretations of the Communications Act were based on the policy considerations it had before it at the time and are not mandated by the statute itself. Mr. Sewell points out that the Commission's decision in the *Bill Welch* case¹⁹ marks a turning point in its view of the public interest in these matters.

In that case the Commission approved the sale of a construction permit for an unbuilt cellular radio station for profit. This meant that the Commission recognized that the holder of the construction

¹⁷ See Petition of Hogan & Hartson 14-18.

¹⁸ Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934* 43, *Federal Communications Law Journal* 277, July, 1991.

¹⁹ 3 F.C.C.2d 6502, 65 R.R.2d 755 (1988).

permit had an interest that could be sold. They noted that this right is a limited one and can not be sold or transferred without the approval of the Commission.

The request of this petition is fully compatible with this limited right, long recognized in other areas of the law (including the U.C.C.).²⁰ It will bring the operation of the law in this area into conformance with the laws affecting other intangible property. The law applied to broadcast licenses will work exactly like the law applied to the licensing of property such as trademarks or computer technology. The owners of these very valuable properties do not give up ownership of them but give permission for others to use them. The owner always retains the right to revoke the license if the licensee uses the property inappropriately and always keeps the right to control any transfers of the license to a third party. Granting a license does not transfer "ownership" of the license, only the right to use the licensed property.²¹

This will eliminate the aberrational business conduct and financial arrangements the misunderstanding has caused in the broadcasting industry.

²⁰ See, White and Summers, *Uniform Commercial Code*, Third Edition, Section 24-6, West Publishing, 1988.

²¹ See, generally,

In the "real world" of broadcast economics and financing the selling price (market value) of broadcast properties has always reflected the value of the license in addition to the value of any real estate and the plant and equipment (the "stick value").²² Thus, the market assumes that the broadcast service will be sold as a "going business" and that the right to use the airwaves granted in the license has real value. Without the license the property would be sold for a fraction of its market value. And without the plant and equipment (at least without the transmitter), the license would be a "bare" one and can not be sold under current interpretations of the law as applied to broadcasters.

Mr. Sewell documents a number of cases where the F.C.C. has recognized that the license is a necessary part of the value of the station. He points out that the Commission has often been reluctant to revoke a license or deny renewal (except in severe cases) because to do so would destroy the value of the business.²³ The Commission has also recognized that lenders have a very real interest in non-renewal of a license when the station is in bankruptcy.²⁴ Further evidence that the Commission attempts to avoid a situation where a station must be sold

²² OPP paper No. 26 39; Sewell 283 n.9.

²³ Sewell 341.

²⁴ *Second Thursday Corp.*, 22 F.C.C.2d 515, 18 R.R.2d 914 (1970).

without its license (i.e., at the value of plant and equipment only) is found in its Distress Sale policy.²⁵ This allows licensees in danger of revocation or non-renewal to sell the station to a member of a minority group or an entity controlled by minorities at 75% of its fair market value.

The NAB points out that the licensee has always had a property interest that can not be taken without due process.²⁶ But they have expressed some reluctance to recognize this interest as an "asset," fearing it could be used as justification for a spectrum tax or license fees.²⁷

If broadcasters are to get loans at the rates available to other businesses, their lenders must be sure that the business can be sold for its full value in case of default. The license must be a part of that property in order to insure that it will be sold as a going business. This benefits all parties to the transaction (including any unsecured creditors) and reflects the reality of the broadcasting business and the challenges it will face in the next decade.

²⁵ *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 42 R.R.2d 1689 (1978).

²⁶ NAB Reply Comments 3.

²⁷ *Broadcasting*, November 25, 1991 54.

III. A SECURITY INTEREST IS NOT A DE FACTO TRANSFER OF CONTROL OF THE LICENSE.

Fears that lenders who have a security interest will attempt to control the activities of their broadcaster-debtors have been expressed by the Commission in a number of cases and several of the comments in this proceeding. Mr. Sewell points out that ordinary commercial covenants designed to protect the lender do not raise questions of de facto control.²⁸ In fact, lenders who only loan money on the value of the plant and equipment have always been able to threaten to close the station down by repossessing the transmitter, but this has never been considered a serious threat to the independence of the licensee.²⁹ In fact no cases of attempted control by lenders have been cited by any of the commentators.

A security interest would impose far less control on the broadcaster than financing by selling equity because equity owners typically want voting rights.

The analysis of control in the *News International, PLC* case indicates that the Commission recognizes the difference between influence and control:

²⁸ Sewell 297 nn.73-74.

²⁹ *Turner Communications Corp.*, 68 F.C.C.2d 559, 42 R.R.2d 1315 (1978).